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83-72-I



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June 13, 1983

Mr. Delbert Downing
Chairman
Water Resources Board
37 Pleasant Street
Concord, New Hampshire 03301

Dear Mr. Downing:

By a memorandum dated May 16, 1983, you asked our opinion on the following two questions:

1. Whether the New Hampshire Water Resources Board may deny a party a permit to erect a dam or increase the height of an existing dam, pursuant to RSA 482:16-22, simply because the party intends to use eminent domain procedures to obtain property necessary to build the dam or otherwise complete the dam.
2. Whether the Board may condition a dam construction and flowage permit under RSA 82:19-22, on the permittee returning "for further hearings" before the Board, if the petitioner decides to initiate eminent domain proceedings for any part of the project.

Our response to your inquiries is in the negative. It is our opinion that the Board may not deny a party permission to erect a dam or increase the height of an existing dam pursuant to RSA 482:16-22 simply because the party intends to use eminent domain to obtain the property rights necessary to complete the project in question. Similarly, it is our opinion that the Board may not



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condition a dam construction and flowage permit granted under RSA 482:19-22 on the permittee returning for further hearings if the permittee decides it must use the right of eminent domain in order to complete its dam project.

The questions the Board has asked relate to New Hampshire's so-called mill dam statute, RSA 482:16, et seq. This statute authorizes a party to erect a dam or increase the height of an existing dam if, after hearing, the Water Resources Board finds that the proposed project is "of public use and benefit." RSA 482:19 and 482:21. The statute further provides at RSA 482:31 that any party who obtains Board approval for such a project may take, by eminent domain, such property rights as are necessary to construct the project in question. Our conclusion that the Board may not deny a dam development permit under RSA ch. 482 on the basis of the developer's intent to utilize this right of eminent domain is based on two considerations.

First, a review of RSA ch. 482 and the relevant case law suggests that the Legislature did not intend considerations relating to the right of eminent domain to enter into the Board's resolution of the question of whether a particular project is of public use and benefit for RSA ch. 482 purposes. In Conway v. Water Resources Board, 89 N.H. 346 (1938), the New Hampshire Supreme Court indicated that in determining whether a particular proposed project is of public use and benefit, the Board must determine whether the benefits the project will yield (i.e., energy production and flood control) exceed or are greater than the burdens which the project will generate. Id. at 354.¹ In this regard, the Legislature has specifically directed that, in determining whether a project is of public use and benefit, the Board should take into account the effect the project will have on scenic and recreational values, upon fish and wildlife, upon the natural flow of the river, and upon bathing and other uses. RSA 482:21. The Legislature nowhere

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1. The question of whether a particular dam construction project is of "public use and benefit" is a question of fact. Conway v. Water Resources Board, 89 N.H. 346, 354 (1938). The courts have made clear that projects which will yield gains in the areas of flood control, hydroelectric development, and other such areas are projects of public use and benefit within the meaning of RSA 482:21. Id. See also, RSA 482:35.

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directs the Board to take into account the developer's need to use eminent domain to accomplish or complete his project goals. The Legislature's failure to include eminent domain in the list of factors to be considered in determining "the public use and benefit" question supports the conclusion that the Board should not consider the developer's eminent domain needs when passing on an RSA ch. 482 dam construction petition.

Also supporting the conclusion that the Board may not deny a party permission to erect a dam simply because the party intends to use the power of eminent domain to acquire property rights needed to construct the dam are the provisions of RSA 482:31. This section of the statute says that any person proposing to erect a dam "having obtained an order from the water resources board [to do so] ..." may use the power of eminent domain, as needed, to complete his project. Section 31 gives the developer a right to use the State's power of eminent domain to complete an RSA ch. 482 dam project. It evinces a legislative judgement that it is in the State's best interest to give private developers access to the State's right of eminent domain in cases where the benefits of a proposed project outweigh the project's estimated environmental losses.² This legislative judgement is binding on the Board. It follows that the Board may not undermine this judgement by denying an RSA ch. 482 permit because the developer intends to exercise that right which the Legislature says he may exercise, namely the right of eminent domain.

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2. Mill dam acts such as RSA ch. 482 give private developers the right of eminent domain with respect to dam construction projects because the developers' personal objectives coincide with the State's legitimate interest in having its water resources developed to their fullest extent. R. Clark, et al., Waters and Water Rights, § 303.1 (1970). In such cases, the Legislature has decided that it is in the State's best interest that the power of eminent domain be made available to developers so that projects of public benefit cannot be held hostage to the unreasonable demands of one or more landowners who may refuse to sell their land even though acquisition of the property in question is critical to the success of the project in question. Id.; Company v. Fernald, 47 N.H. 444, 459 (1867).

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For like reasons, the Board may not condition an RSA ch. 482 permit on the condition that if the developer decides to initiate eminent domain proceedings, it must return to the Board for further hearings. RSA 482:31 makes clear that once the Board grants its flow permit, the developer has the right to petition the court for eminent domain taking purposes. The statute does not require the developer to return to the Board for permission before it so acts; and thus, the Board cannot, by a condition to its permit, compel it to do so.

Very truly yours,

Edward L. Cross Jr.

Edward L. Cross, Jr.
Assistant Attorney General
Environmental Protection Division

ELC, JR./tlr
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